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Lecture

Reconsidering Legalism*

Robin West†

About forty years ago, in 1964, the political philosopher Judith Shklar published a remarkable book, *Legalism*,¹ in which she put forward two propositions: first, that an ideological commitment to “legalism” unites the legal profession, including academy, bar, and bench,² and second, that what “legalism” consists of is “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”³ Thus, putting the two together, being a lawyer means that one is committed to the ideological proposition that moral conduct is a matter of following rules.⁴ In the first of two extended essays in the book, Professor Shklar went on to make a number of arguments about this attitude, and its relation to academic jurisprudence and politics. First, with respect to legal philosophy, she argued that “legalism,” so understood, underlies natural law and legal positivism both, so that at least from an outsider’s perspective, these two warring jurisprudential stances have far more in common than either is inclined to suppose.⁵ Second, she argued, legalism can be found in a “more or less” state in a wide range of political, social, and cultural institutions and practices, and

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1. JUDITH SHKLAR, *LEGALISM* (1st ed. 1964).

2. JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 8–12 (2d ed. 1986).

3. *Id.* at 1.

4. *See id.* at 1–2.

5. *See id.* at 30–31, 106.

not just in those institutions dubbed "legal." Therefore, barriers generally drawn by professional legal philosophers between "jurisprudence" and political and moral philosophy are artificial and unjustified.⁶ Third, she argued that legalism, because of its insistence on the morality of conduct that conforms with rules laid down in the past, indirectly commits lawyers of all stripes to the proposition that law is simply *there*—if one has a moral duty to obey rules, it must be the case that the rules are *there*⁷—and accordingly, legalism commits lawyers to the formalist claim (which she clearly finds dubious) that existing law fully determines all questions posed by conflicting rights and duties.⁸ Law, then, in the empire of legalism, has a static, given, autonomous, seamless, and complete nature, not only for formalists, who hold this thesis quite explicitly, but in some fashion, for virtually all lawyers.⁹ Lastly, Shklar argued, legalism, and hence the profession that defines itself by reference to it, has a distinctively and unmistakably conservative hue. The rules that define rights, and to which we are morally obligated to conform, were by definition laid down in the past. Legalism, she concluded, is committed to the preservation of that past, and is virtually by definition a conservative ideological worldview.¹⁰

In the second essay, titled "Law and Politics," what she later came to characterize as the "real point" of the book,¹¹ she argued that the legalist attitude—and the ideology it represents—is sometimes profoundly misplaced even where the hopes for it are highest.¹² It was, in fact, she argued, misplaced in the various tribunals and trials for war crimes that followed the cessation of hostilities in World War II.¹³ Even if those trials could be justified on political or consequentialist grounds—and Shklar argued that at least the Nuremberg trials, if not the

6. *See id.* at ix–x, 2–3, 15–16, 33–35, 222–24.

7. *See id.* at 8–12, 15–16, 19.

8. *See id.* at 95, 97, 104–06, 108–09.

9. *See id.* at 93–110 (discussing New Deal realism and its eventual absorption into natural law).

10. *See id.* at 10–14.

11. *Id.* at xiii.

12. *See id.* at 170–79 (analyzing the use of legalism during the Nuremberg trials); *id.* at 170–200 (analyzing the use of legalism during the Tokyo trials); *id.* at 200–09 (analyzing the use of legalism during the Moscow political trials).

13. *See id.* at 170–200 (discussing the Nuremberg and Tokyo trials).

Tokyo trials, could be¹⁴—they could not be justified or even understood as resting on an affirmation of legalism, from either a positivist or natural law perspective.¹⁵ Those trials did not establish, as some of the American prosecutors hoped they would, the natural lawyer's claim that acts of aggressive warfare violated universally recognized moral laws of nature, and for that reason, the individuals who conspired to perpetrate them could be properly punished.¹⁶ Nor did they establish the positivist lawyer's claim, as some of the prosecutors hoped they would, that the same acts could be seamlessly analogized to domestic crimes, or punished under preexisting laws of international custom, all in accordance with positivist understandings of law.¹⁷ They substantiated, in other words, neither the natural lawyer's nor the positivist's claim that the wrongness of these acts could be characterized as a failure to follow the "rules laid down," and therefore that the trials for those acts could be subsumed within legalist values.¹⁸ Rather, no aspect of the aggressors' acts, not the immorality, not the evil, not even their historical character, could be sensibly characterized as a failure to "play by the rules"—*any* rules, whether natural or positive. Yet it is really that failure, and only that failure—the failure to conform one's conduct to preexisting rules—that law and legalism appropriately reach. Consequently, the trials represented, if anything, the limits of legalism, not its universal reach.¹⁹ Inadvertently, they showed the implausibility of asserting a legalist mentality in international affairs. They did not augur the onset of a world order, evidence the existence of an international community, or facilitate a law of and for global citizens—all preconditions of the natural lawyer's or positivist's prosecutorial claim that the wrongs of World War II, and in the case of "waging aggressive war," even its causes, could be assimilated to a legalist framework. Again, in a legalist framework, the criminality of these acts of war would have lain in the defendants' collective failure to conform their war-making conduct to preexisting rules. The trials showed the hollowness, and

14. *Id.* at 154–55.

15. *Id.* at 156–58.

16. *See id.* at 179–90 (discussing the prosecutorial approach taken in the Tokyo trials).

17. *See id.* at 170–79 (discussing the prosecutorial approach taken in the Nuremberg trials).

18. *See supra* notes 15–17 and accompanying text.

19. *See Shklar, supra* note 2, at 127–29, 147.

possibly the arrogance, of that hope.²⁰

In the forty years since Shklar's book was published, not all, but much of it, has stood the test of time, not the least of which is the book's most basic claim—assumed rather than argued—that “legalism” is a discrete ideology, consisting in part of the attitude and attendant belief that complying with rules is a moral mode of being in the world. I think it is almost beyond question that this legalistic attitude—an attitudinal belief that rule abidance is a moral mode of being in the world—is *a part* of what unites the legal community in something like the manner that Shklar so aptly described.²¹ Although still controversial, I believe Shklar's view that legalism, as she defined it, has a conservative cast to it was also correct.²² Legalism, law, and lawyers insist on the value of following rules, apart from the value of the rules, in part, because we insist on the value of preserving those institutions of the past—markets, families, states, nations—that are the product of those rules and that give us our individual and collective identity. We value the rules and their products so highly, perhaps for no other reason than that this practice is what makes us human.²³ Of course, when legalism is read as a constraint not only on citizens but also on states, the same ideological stance takes on a libertarian cast as well: When state action can only be taken in conformity with rules, that increases certainty and, hence, indi-

20. See *supra* notes 15–19 and accompanying text.

21. Modern developments in jurisprudence have evidenced the vitality of this understanding of legal ideology, particularly the rise of neo-formalism over the last ten years. See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982) (defending morally principled, rule-bound adjudication against the critical legal studies' charge that objectivity in judging is unattainable); Antonin Scalia, *Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989) (discussing formalism and judicial discretion); Frank Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 11, 20 (1998) (arguing that rule-bound judging requires formalism); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 548 (1988) (discussing various conceptions of formalism). For an excellent and sympathetic analysis of the “New Formalism,” see Thomas Grey, *The New Formalism* (2003) (unpublished, on file with author).

22. The conservatism of twentieth century formalism is sometimes described as merely contingent—stemming largely from the identification of formalist and anti-realist jurisprudence in the twentieth century with political conceptions of a minimalist, noninterventionist state. See Grey, *supra* note 21, at 4–5. Shklar sees a deeper connection.

23. See Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1064–68 (1990).

vidual, citizen, and corporate freedom.²⁴ Even with the libertarian caveat, however, Shklar's larger point is correct: A moral orientation that places positive value on conformity to rules is going to be, for the most part, in service of the status quo. Legalism, whatever else its virtues or vices, respects the authority of the past.²⁵

And, Shklar's core argument in the second half of the book—that this legalistic moral orientation is sometimes inappropriate, and that insistence on it will sometimes inadvertently demonstrate law's limits rather than law's potentiality—seems, at least on first blush, to have been well taken. More specifically, it seems to have been borne out by the passions and arguments of both opponents and proponents of America's 2003 war with Iraq. I will argue ultimately that this “first blush” is misconceived, but nevertheless, there has clearly been at least a divergence between legalist and nonlegal perceptions of the war and its legitimacy. Thus, whatever lawyers may believe, it seems to many, and perhaps most Americans who supported (or are supportive of) this war, and who are not lawyers, that it doesn't really matter all that much to the justification of America's use of force whether or not Saddam Hussein was in violation of United Nations resolutions, or whether coalition aggression against his regime can properly be characterized as “defensive.”²⁶ His regime was horrific, sadistic, and dangerous. The case for toppling him, accordingly, was a moral one—to wit, that his dictatorial regime was a humanitarian and political disaster—and not the legalistic one that he had repeatedly defied the “law” of the United Nations. The “law” of the United Nations, or more broadly, “international law,” for many supporters of the war, was not in fact, and furthermore rightly was not, the trigger for the invasion and occupation of Iraq.²⁷ Rather, it was the immorality of the regime. On the other hand,

24. See Schauer, *supra* note 21, at 544–48.

25. See *supra* notes 9–10 and accompanying text.

26. See, e.g., Thomas L. Friedman, *Because We Could*, N.Y. TIMES, June 4, 2003, at A31 (arguing that the existence of weapons of mass destruction in Iraq was, and remains, irrelevant to the justification of the war); David Sanger & Carl Hulse, *Republicans Dismiss Questions Over Strength of Evidence on Banned Weapons in Iraq*, N.Y. TIMES, June 18, 2003, at A14 (stating that Bush and aides believe that the American public's relief over the ouster of Hussein will overwhelm questions about the administration's case against him).

27. See *Victory in Iraq, Even Without Saddam and Weapons*, N.Y. TIMES, May 18, 2003, § 4, at 2.

to many of the critics of the G.W. Bush administration's war with Iraq, the argument against this elective, unnecessary, aggressive war was *likewise*, at heart, political and moral, not legal. It is *wrong* to engage in nondefensive warfare; it is *wrong* for America to behave imperialistically; it is *wrong* to risk a worldwide war of cultures; it is *wrong* to kill so many people when one's own nation's security is not demonstrably threatened. Although the war's critics who were also lawyers insisted upon the argument that such wars violate a provision of the United Nations Charter agreement, and are accordingly illegal, nonlawyer opponents of the war seemed to have little passion for this view.²⁸ Legalist arguments either for or against the Iraq war, at least to many of the proponents and opponents both, perhaps, seemed inappropriately fetishistic, hollow, or just oddly bookish. This is impressionistic, and I know of no surveys or studies yet done to confirm or refute this hypothesis. I conclude from this impression only that Shklar's central challenge to the legal profession—that its organizing commitment to legalism is an inappropriate ideological framework within which to conduct world affairs—is if anything more timely now, when law and legalism are not only both increasingly apparent on the world scene, but are also increasingly threatened, in international and domestic arenas both, than when she first issued it.²⁹

28. U.N. CHARTER art. 51. It was extremely important to Prime Minister Blair, whether or not it was important to Bush, to establish that the war in Iraq was a legal one under existing international law. See Prime Minister Tony Blair, Statement Opening Iraq Debate in Parliament (Mar. 18, 2003), available at <http://www.number-10.gov.uk/output/Page3294.asp>.

29. Although it is easy enough to multiply examples from the contested domain of international law for Shklar's thesis, one does not have to so limit it; our own constitutional tradition is also replete with examples of the oddly inappropriate tone of legalistic argument in political contexts where it seems out of place. Abortion law and politics is perhaps the most obvious example. While pro-life advocates advance the moral claim that abortion is murder, and that a state therefore has a moral obligation to criminalize it; and pro-choice proponents advance the similarly moral claim that forced pregnancy is tantamount to slavery, and that a state therefore has a moral obligation to ensure access to abortion; lawyers, distinctively, argue on a different terrain altogether. The real issue, apparently agreed upon by pro-life and pro-choice lawyers all, is whether *Roe v. Wade*, 410 U.S. 113 (1973), is more like a reviled and overturned 1905 case, *Lochner v. New York*, 198 U.S. 45 (1905), which dealt with maximum hours regulation of New York bakers, and therefore "wrong," or more like a still-appreciated 1923 case involving the education of children in languages other than English, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and therefore "right." The proper question, in other words, *from a legalist perspective*, is not whether abortion is murder or forced pregnancy is slavery, or

This essay is in the spirit of a friendly amendment. I have found Shklar's central arguments to be more compelling every time I have reread this book over the last twenty years. Nevertheless, I want to argue in this essay that in spite of *Legalism's* strengths, Shklar's core anthropological claim *about the profession*—more often asserted, rather than argued, throughout the book—that legalism, the attitudinal glue that binds lawyers professionally, consists of a commitment to the morality of rule abidance—is flawed, not because it is wrong, but because it is underinclusive. While legalism consists of something like what she described, it is by no means *only* that. As Shklar herself belatedly pointed out in a preface to a new edition published twenty years after the original,³⁰ her argument in the original edition of the book was unnecessarily confused by her use of the same term—"legalism"—to apply to two different phenomena. First, she used the term "legalism" to refer broadly to the set of beliefs and attitudes and moral commitments, whatever they may be, that bind the legal profession.³¹ Second, she used the word "legalism" to refer to the much more specific idea, which

whether the state is right to prohibit it or wrong to fail to ensure access to it. Rather, the legalist questions are whether the states were following the rules when they outlawed abortion; and whether the Supreme Court was following the rules, in *Roe*, when it ruled that the states broke the rules when they outlawed abortion; and whether the Supreme Court was later following the rules, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), when it ruled that the rule of stare decisis required it to follow the rule of *Roe v. Wade*, even if *Roe* had itself not been decided in accordance with the rules, when the Court ruled that the states had broken the rules. This legalistic debate must be strangely disorienting to anyone who cares about the moral issues, for reasons analogous to those Shklar marshaled when she wrote her justly famous critique of the war crimes tribunals: If abortion is murder, then whether or not the state is following the rules when it outlaws it, it is nevertheless clearly right to do so, and if the rule says otherwise, then the rule is wrong. Similarly, if forced pregnancy is slavery, then likewise whether or not the Court is following the rules when it forbids the state to outlaw it, it is clearly right to do so, and again, if the rule says otherwise, so much the worse for the rule. The inclination to follow or break rules adds only *de minimis* to a moral calculation, when the stakes are so high, or when the evil is so great—even in domestic politics, no less than in international. To argue about whether acts follow the rules laid down when the acts under discussion are arguably on the same plain as slavery or the Holocaust is worse than fetishistic; it is a sort of fascistic madness. *Roe* and *Casey* might be, to domestic legalism, what the *Eichmann* trials were to international law: that which in retrospect, inadvertently, and despite O'Connor's valiant attempts to the contrary in *Casey*, illustrates the limits, not the potentials, of legalism as an ideology of any meaningful utility toward the end of a just peace.

30. SHKLAR, *supra* note 2, at vii–xiv.

31. *Id.* at vii–viii.

might, of course, be held by plenty of nonlawyers as well as lawyers, that rule abidance is a morally good way of being in the world.³² It is easy in retrospect to see why she used the same word to apply to both. It was her contention then, as it was twenty years later, that legalism in the second sense—the belief in the morality of rule abidance—is indeed the substance of legalism in the first sense—the ideology of lawyers, the set of beliefs and attitudes that bind the profession, whatever they may be. But it begs important questions to use the same word for both. One such begged question is whether or not “legalism,” understood as a belief in the morality of rule abidance, even assuming it is a *part* of our legalistic ideology, exhausts it. I think it does not. A fuller account of the ideology of legalism would go some way toward explaining why her description of the political cast of the profession, although partly true, is nevertheless not entirely true: why lawyers are not *as* homogenous as she suggested; why all legalists are *not* formalists; and politically, why lawyers are not nearly as conservative a profession as her argument suggests we are. A fuller account of legalism that would grant its ideological nature and grant that it consists in part of what Shklar describes, but then goes beyond it, might, I think, explain why legalists, still true to legalism, sometimes break from a Burkean respect for the past—why, in short, legalism is not rule fetishism.

My second point, which I will take up very briefly toward the end of this essay, is that a fuller account of ideological legalism also casts the central normative question Shklar raised, regarding the *appropriateness* of legalism in international affairs, particularly in times and matters and questions of war, in a different light. If legalism consists of *only* a commitment to the morality of playing by the rules, then it does seem oddly inappropriate in the international arena. If that's what legalism is, then the aspirations of public international law—and maybe even public domestic law—are on shaky ground indeed and for the reasons, roughly, that Shklar gave: oftentimes the rules don't exist;³³ to the extent that there are rules, the community of nations that might give them meaning doesn't exist;³⁴ the rules that are there are too often steeped in hypocrisy rather than common consent;³⁵ the motives of actors, leaders, and

32. *Id.* at viii–ix.

33. *See id.* at 147–49, 153–59.

34. *See id.* at 157–58.

35. *See id.* at 161–65.

would-be criminals on the international scene are often far removed from the intent to follow or break rules, even though intent is central to findings of guilt, innocence, liability, or no liability in legalistic regimes.³⁶ Most important, and most generally, rules—any rules—don't now, and maybe never will, encompass the dimensions of international politics, and therefore can't possibly govern it, and even less can they forge such an embracing network as to imply a meaningful moral commitment so that international actors must obey them.³⁷ If ideological legalism is at heart a commitment to the morality of rule following, then it seems to have a *de minimis* role in international politics, and what role it does have is less than inspiring.

But ideological legalism—the attitudinal stance of lawyers—consists of more than a commitment to rules, or so I want to urge. Seeing what is left out—appreciating what ideological legalism consists of, beyond a commitment to the morality of rule abidance—might help us see why at least many lawyers, and perhaps many others who are not lawyers, hold out hopes for law, lawyers, procedures, and legal forms, even in circumstances where a bald commitment to rules for the sake of rules and rule abidance for the sake of conformity would be seemingly inappropriate, and even wildly so.

Let me say briefly by way of further introduction why, in my view, these reservations about Shklar's thesis have not been raised earlier, and why they may be fruitfully raised now. Although Shklar was unambiguously critical of legalism's excesses, its hubris, and its insularity, she did not anticipate, and later did not embrace, the far more thorough-going critique of legalism put forward in the decades that followed her book by the critical legal studies movement: to wit, that the core aspiration of legalism—the control of both individual and state conduct through rules—is simply impossible to achieve (and that the aspirations of any liberalism that depends on legalism are likewise unattainable) because of the inherent indeterminacy of rules—*any* rules.³⁸ If the application of rules does not lead to

36. *See id.* at 170–79.

37. *See id.* at 190–200.

38. Shklar has a short, but interesting discussion of critical legal studies in the preface to the second edition of her book, in which she more or less equates critical legal studies with the communitarianism and loose humanistic Marxism of Roberto Unger. *See id.* at xi–xiii. As such, she finds nothing much new in it, and distances herself from it. *Id.* She does not address or try to refute the indeterminacy critique, which, again, renders her own critique of legalism largely beside the point.

determinate outcomes, it is hardly possible to control the conduct of state actors or citizens through their promulgation, and it is therefore disingenuous (or naive) to praise or condemn official conduct on legalistic grounds.³⁹ If an attitudinal commitment to this belief is the glue that binds the profession, then the profession rests on an illusion, just as does any political liberalism that purports to rest on the same quicksand.⁴⁰ This quite different critique of legalism—that its aspirations are impossible to achieve—obviates the logic of Shklar's much more friendly, internal, and limited criticism—that legalism misunderstands its own political and ideological nature, that it often overstates its boundaries, and that it expresses ideals and hopes sometimes inappropriate to certain political contexts in which it is often raised. The critical legal studies view also, less directly, obviates the logic of the criticism of Shklar's critique that I want to raise here—that philosophical legalism, understood as a commitment to the morality of rule abidance, is a

39. There are now so many demonstrations of this indeterminacy critique in action that it is increasingly meaningless to string cite them. For a striking modern example, see the exchange between Jack M. Balkin and Sanford Levinson, and Frank I. Michelman, on whether or not a critical legal studies devotee (the subject of the exchange was Mark Tushnet) could possibly, or consistently, criticize a case such as *Bush v. Gore* (or any other case) as wrongly decided. Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173 (2001); Frank I. Michelman, *Tushnet's Realism, Tushnet's Liberalism*, 90 GEO. L.J. 1999 (2001). I comment on their debate in Robin West, *Reconstructing the Rule of Law*, 90 GEO. L.J. 215 (2001). Some of the classic indeterminacy critiques include Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (deconstructing contract law); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (deconstructing criminal law); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (deconstructing contract law); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (showing the phenomenology of a deconstructive approach to adjudication); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (deconstructing constitutional law).

40. The fullest argument to this effect, that holds hostage not only legalism, but liberalism as well, to the indeterminacy critique, is Mark Tushnet's early book, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988). The argument is contained in the first three substantive chapters, which examine judicial review as a function for perfecting democracy, for ensuring morally good answers to political questions, or for achieving justice. See *id.* at chs. 1–3. Legal indeterminacy frustrates all three purported purposes, but liberalism clearly requires purposive judicial review. See *id.* Therefore, liberalism, as a political ideal, fails. See *id.*

part of, but not all of ideological legalism. I do not doubt that philosophical legalism—a moral commitment to rule abidance—is a necessary part of legalism—“anthropological legalism,” so to speak—writ large. What I want to urge is that it is not sufficient. But clearly, if philosophical legalism is even a necessary part of the ideology, whether or not sufficient, and if it is incoherent for the reasons put forward by the critical legal studies movement, then there’s not much point to further inquiry. Legalism as an ideology, even if a broad, encompassing, and more ecumenical ideology than that described by Shklar, is incoherent, if any necessary part of it is.

It is primarily for this reason, I think, that neither Shklar’s descriptive account of legalism, nor the specific critique she mounted against it, has had the hearing it deserved. In the time since the book came out, and largely because of the impact and successes of the critical legal studies movement, we have been absorbed instead with questions concerning legalism’s *possibility*: is it possible, whether or not desirable, to conform conduct to rules; is it possible, whether or not desirable, to constrain the actions of states and their agents by rules; is it possible, whether or not desirable, to decide cases along the lines demanded by the rule of law. This diversion away from the actual substantive content of Shklar’s descriptive and critical account of legalism, I think, has been unfortunate. Shklar, after all, intended her “polemical” treatment of legalism to begin a dialogue, not end one. She meant, above all else, to *ask*, not answer, a series of questions about legalism’s point, its value, its universality, and ultimately its contribution to world history and to the affairs of state. Those questions are the wrong questions, if legalism is incoherent—if its aspirations are themselves impossible to even sensibly state, much less achieve. Legalism, as she defined it, has no point, no value, and no contribution to world history, other than, of course, to obfuscate, mask, and mystify the nature of power.

Perhaps it is now time to venture the suggestion that the answer to the question posed by the critical legal studies community regarding legalism’s possibility seems to be yes, legalism is a live possibility, even in spite of law’s relative indeterminacy, and for at least two reasons, both of which have been advanced in recent years by critical scholars themselves. First, indeterminacy may be a significant but nevertheless limited quality of rules; second, the indeterminacy of rules may not mean that outcomes themselves are indeterminate. If rules can

be sensibly read, and typically are read, against a backdrop of agreed-upon, community-wide predispositions, or “prejudices,” to use the Gadamerian term, or interpretive understandings, then rules lead to outcomes, in spite of their literal indeterminacy.⁴¹ In either case, a commitment to legalism is possible, even given some indeterminacy in rules: The morality of according one’s conduct to rules survives the indeterminacy of rules if the indeterminacy is partial instead of total, and if the rules, coupled with attitudinal and shared interpretive predispositions, generate determinate results. What Shklar identified and what might best be called “philosophical legalism”—the belief that following rules is a moral way of being in the world—is a coherent position, the limited indeterminacy of rules notwithstanding, and the mode of being it suggests, whether or not desirable or morally attractive, is most assuredly attainable. If philosophical legalism has emerged after a thirty-year critique as at least a coherent view, then we can sensibly pose both the descriptive question anew, of whether or not it is a correct or exhaustive account of legal ideology, as well as the normative question, whether or not that ideological worldview is a desirable one, and when, and where, it may be inappropriate. Those are precisely the questions that Shklar’s

41. The indeterminacy thesis has meant many things, but the most plausible thesis is that legal decisions are not “determined” by legal rules because the rules are themselves “indeterminate.” This does not mean, one should stress, that the results are themselves random or even indeterminate; instead it means that the stability of the results is a function of pre-interpretive assumptions, prejudices, or expectations rather than a function of the stability of rules. The results may then be fully determinate—even depressingly overdetermined—even if the rules have the fluidity the critical scholars suggested. See Fiss, *supra* note 21, at 762; Margaret Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781, 813 (1989) (stating that, in light of the limited version of the indeterminacy thesis, the rule of law should be reinterpreted rather than abandoned). The account of indeterminacy that seems to have survived over the last three decades might best be called Gadamerian, rather than Derridian: It is the quite limited claim that interpretation invariably occurs within a context of predispositions and “prejudices,” which give to the interpreted work a particular meaning and a range of stable possible meanings. Those meanings are a function of the predispositions and prejudices of the community of readers, as much as of the ambiguities in the work itself. For an exploration of the role of Gadamerian interpretation in legal analysis and its relation to critical legal theory, see the *Symposium on Philosophical Hermeneutics and Critical Legal Theory*, 76 CHI.-KENT L. REV. 1125 (2000). For a (somewhat) more critical assessment of the role of Gadamerian thought in at least radical legal criticism and the comments on the collected articles, see Robin West, *Are There Nothing but Texts in This Class?*, 76 CHI.-KENT L. REV. 719 (2000).

book raised. There is surely no time like the present, when ideological legalism is again so squarely on the world stage and in a political forum where its appropriateness is anything but obvious, to restart this interrupted conversation.

LEGAL PACIFISM

The “friendly amendment” to Shklar’s thesis that I want to suggest in this essay is simply that “ideological legalism” consists not only of an attitudinal commitment to the morality of playing by the rules, but *also* an attitudinal commitment to the preferability of Hobbesian *Peace* over a Hobbesian *Warre*.⁴² Less metaphorically, legalism consists not only of a commitment to rules, but also of the judgment that the sovereignty of the state is better than the natural sovereignties of nature, at least to this extent: Public power exercised in the interest of the people is to be preferred to private violence exercised toward the end of individual vainglory, or the consequences of that violence. Attitudinally, lawyers like not just rules, but also peace, and broadly concur in the Hobbesian claim that a state, and the law it produces, are positive goods because they are one way to achieve peace. If we complement the commitment to rules, ably demonstrated by Shklar, with the commitment to peace through law, as argued by Hobbes, a more accurate and I believe more appealing portrayal of the attitudinal and ideological core of legalism emerges.

Just to refresh recollection, let me begin to build the case for this claim with a (somewhat extended) reference back to Hobbes. Hobbes begins his argument for the Leviathan with this famous observation about the quality of life in a state of nature:

[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. For WARRE, consisteth not in Battell onely, or the act of fighting . . . the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is

42. THOMAS HOBBS, *LEVIATHAN* 88–89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.⁴³

Cast against the nasty, brutish, short life, bereft of art, letters, knowledge, history, culture, and society, Hobbes argued, a life in a state with an organized sovereign authority, in which force is monopolized, and which has the legitimate, delegated authority to deter, prevent, and punish private violence has much to commend it. The individual who can live without fear is freed, in a state of peace, not only to pursue industry, but also to pursue culture, education, navigation, knowledge, architecture, history, the arts, letters, and society—loosely, to pursue pleasure in life—from which he is barred, in the state of nature, by fear and the constancy of effort required to keep the violence, that is the fear's root cause, at bay.⁴⁴ This, as we learn from Hobbes's able biographers, Hobbes knew firsthand.⁴⁵ To secure freedom from fear, the source of that fear must be addressed, and the source of it is the propensity toward violence of other men—motivated, as all men are, Hobbes thought, by the thirst for power and domination, by the need to defend oneself, and by vanity.⁴⁶ To hold at bay this propensity toward debilitating violence, all men, for the most passionate of reasons, rationally agree to delegate their power and right to use it to a central sovereign.⁴⁷ That central sovereign, now with a monopoly on the legitimate use of violence and force, can then deter violent private aggression, and thereby guarantee a measure of security, safety, and freedom from fear—and thus improve, hugely, the quality of life, as well as longevity, of all.

The consequence, still following Hobbes's lead, of the inhabitants' decision in the state of nature, to delegate to a sovereign power their natural right to use whatever force and violence is necessary to promote their own glory, to protect themselves against the violence of others, and to achieve dominion over others, is that the sovereign to whom that natural right is delegated is under a duty—we might call it, in fact, a

43. *Id.*

44. *Id.* at 89.

45. See Richard Tuck, *Introduction* to HOBBS, *supra* note 42, at ix, x–xii.

46. HOBBS, *supra* note 42, at 88.

47. *Id.* at 90, 121.

"first duty"—to provide those who have so bargained, a measure of protection against violence.⁴⁸ The means by which the sovereign does so is the promulgation of laws. Derivatively, Hobbes was very clear, the citizen has a positive right to that protection.⁴⁹ The Hobbesian citizen has a fundamental right, in other words, to the protection of law, and when the citizen no longer receives that protection, the citizen's reciprocal duty of loyalty to the sovereign abruptly ends.⁵⁰ The "first duty" of a state, both in Hobbes's classic treatment and I will suggest in a moment in the liberal tradition that followed, is *not*, or not only, to constitute itself in a set of rules so as to limit its own formidable power. The "first duty" of the state is to promulgate positive law that will deliver citizens out of the state of fear that is the subjective reality of the state of *warre*, or the state of nature, and into the state of freedom from fear, that is the subjective reality of the state of civic life, or peace.

Of course, for the presence of law, and the state, or the sovereign that produces it, to actually be superior to the state of nature, the power of the sovereign must be controlled so that it is less fearsome than the power of the citizen's natural competitor in the state of nature the commonwealth replaced. It is obviously no secret that this danger, and the need to address it, notoriously, was not Hobbes's strong suit.⁵¹ Much of the liberal, social-contractual tradition that followed in Hobbes's footsteps can be best read as seeking to close this gap in Hobbes's politics. Perhaps the danger of the too-strong-sovereign can be addressed through a regime of rights, as a number of rights theorists and constitutionalists have urged since Hobbes penned *Leviathan*;⁵² perhaps it can be addressed through democratic

48. *Id.* at 121, 153.

49. *Id.* at 153.

50. *Id.*

51. Mark Tushnet refers to this problem as liberalism's central dilemma, thus equating liberalism with Hobbesianism, and Hobbes's shortcomings with liberalism's. See TUSHNET, *supra* note 40, at 4–10. For recent scholarship on Hobbes that addresses this theme, see Jean Hampton, *Democracy and the Rule of Law*, in *THE RULE OF LAW* 13 (Ian Shapiro ed., 1994), and Michael P. Zuckert, *Hobbes, Locke, and the Problem of the Rule of Law*, in *THE RULE OF LAW*, *supra*, at 63.

52. See John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government* § 135, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 267, 357 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke is, of course, the inspiration for this regime of rights, but contemporary constitutionalists in the rights tradition do not limit rights to property and life, as Locke seems to have done. See, e.g.,

controls that harness the power of the sovereign to the will of the people;⁵³ or, perhaps it can be at least partly addressed through legalism itself.⁵⁴ Or perhaps through all three—but clearly, it must be addressed. Otherwise, the cause of the nastiness, brutality, fear, and barrenness has simply shifted from private violence to public force.

In seeking some resolution of the Hobbesian dilemma, however, political liberals as well as liberal theorists have not lost sight of the central Hobbesian insight that makes the dilemma worth solving. The quality of life in a state that possesses the power to pass law that can in turn deter, limit, and punish private aggression is superior to the quality of a life limited and clouded by the constant threat of violence and domination by others, and for just the reason given by Hobbes: Without security against violence, life is not only short, unpleasant, and fearful, but also lacking in culture, industry, love, education, arts, letters, and society. It is a qualitative difference that is so great, thought Hobbes and with good reason, that it is sufficient to induce otherwise free men to give up a substantial portion of their liberty, pledge their loyalty to the commonwealth, and delegate to that sovereign state the duty to protect them against the violence of others. For reasons basically no different from those offered by Hobbes, a recognition of this “first duty” of government to provide protection against private violence, and to do so through the promulgation of law, has emerged as foundational, not peripheral, to the philosophical “liberal tradition” that followed Hobbes. Thus, the state’s duty to protect its citizens against private violence was the core jus-

BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 5–7, 340–48 (1980) (stating that rights provide a check on state power); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 274 (1978) (asserting that rights exist primarily against the state, limiting the state’s rightful power); JOHN RAWLS, *A THEORY OF JUSTICE* 206–13 (rev. ed. 1999) (stating that justice in a liberal state requires the state to respect and enforce rights that in turn limit the power of the state).

53. For a full argument to this affect, see Hampton, *supra* note 51, at 13–19.

54. This is a major theme in the modern revival of formalism. Many contemporary formalists, as well as traditional liberals, see the “ruledness” of law as a major constraint on otherwise arbitrary and harmful state action. For an example of liberalism and formalism, see RAWLS, *supra* note 52, particularly the chapter on the Rule of Law, *id.* at 235–43. For a defense of formalism that relies on an explicitly conservative understanding of the value of tradition, see Kronman, *supra* note 23, at 1043–63. For an example of formalism and conservatism, see generally Scalia, *supra* note 21.

tification for law, not only for Hobbes, but also for Locke, who added the protection of private property to the sovereign's responsibilities, but nevertheless followed Hobbes on the equally basic point that the sovereign must protect the subject against private violence.⁵⁵ Nineteenth and early twentieth century liberal theorists were equally clear: The state has a duty to protect the citizen against disabling private violence, and more generally, against disabling private exploitation of weakness.⁵⁶ Likewise, and perhaps more to the point here, the Hobbesian claim that the state has a duty to protect against private abuse was explicitly embraced by the most influential liberal theorist of the twentieth century, John Rawls, although not in Hobbes's classical and graphic language.⁵⁷ Rawls is absolutely clear on the point: In his chapter "The Rule of Law in a Theory of Justice," Rawls found what he called "Hobbes's thesis"⁵⁸ to be just as integral to the liberal rule of law as the "legalistic," Shklarian mandate that courts must decide like cases alike, or in accordance with rules. Even liberal theorists of state minimalism, such as Robert Nozick,⁵⁹ are clear that the "watchman" state must protect the citizen against violence from insiders as well as from outside aggression—such basic police protection is not one of the services properly privatized.⁶⁰ It is not called the "night watchman" state for nothing. It is hard to find any prominent liberal theorist who disputes the Hobbesian thesis, and for good reason—it is central, not peripheral to liberalism, that the *raison d'être* of the state's existence is betterment of the lives of its individual citizens, and it is clear that protection

55. Locke, *supra* note 52, § 123. For a full discussion of the Lockean view that the state is obligated under the social contract to protect the individual against private violence, see Steve J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514–16 (1991).

56. See JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 32, 56–57 (1935); JOHN S. MILL, *UTILITARIANISM, LIBERTY & REPRESENTATIVE GOVERNMENT* 6–10, 13–16 (H.B. Acton ed., 1910); Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 684–701 (1985).

57. RAWLS, *supra* note 52, at 206–13.

58. *Id.* at 211.

59. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 26–28 (1974).

60. *Id.* Classical liberals, prominently John Stuart Mill, argued that the state should not police private morality, but never argued against state policing of private violence. See John Stuart Mill, *On Liberty*, Ch. IV, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 1007–08 (Edwin A. Burt ed., 1967).

against private violence, for the reasons cited by Hobbes, is essential, not incidental to that betterment

What do we see in our legal traditions, and specifically in Anglo-American liberal legalism? Although somewhat muted in contemporary jurisprudence, for reasons I will explore briefly below, across time, we nevertheless see the same foundational commitment. The belief, including its attitudinal component, that the "first duty" of the state is to protect citizens against violence was widely embraced, as Professor Steven Heyman has persuasively argued, by the architects, theorists, lawyers, and jurists of the English common law;⁶¹ by the framers of the American Constitution and by the patriots who fought for it;⁶² and perhaps most consequentially, by the drafters of the Constitution's Reconstruction Amendments, who argued not only for a duty of protection, but a duty to provide equal protection of the laws to all citizens, black as well as white.⁶³ The duty to provide "protection of the laws"—and equally—has found its way into our constitutional blueprint: According to the literal text of the Fourteenth Amendment, if not its now dominant judicial interpretation, the state has an affirmative duty to provide all citizens "equal protection of the law."⁶⁴ What they must protect against, if history is any guide at all, is, minimally, the lethal, violent impulses of others.⁶⁵ No state *shall deny* equal protection of the law. It must deliver all equally from the state of *Warre* and into the state of *Peace*. The same sentiment—that the first duty of government is to protect citizens against violations of their rights by others—appears in Justice Marshall's opinion in *Marbury v. Madison*,⁶⁶ surely a cornerstone of legalist constitutional ideology. "Legalism"—if by that we mean the professional ideology of lawyers—is as committed to the proposition that law exists so as to protect all of us against violence and the fear of it, as it is committed to the

61. Heyman, *supra* note 55, at 512-14.

62. *Id.*

63. *Id.* at 546.

64. U.S. CONST. amend. XIV, § 1.

65. See generally JACOBUS TENBROEK, *EQUAL UNDER LAW* (First Collier Books 1965) (1951) (arguing that the Fourteenth Amendment is rooted in the goal of achieving security of the person against physical attack for freed slaves); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 73-101 (1994) (speculating on meanings of equal protection, and whether the anti-violence mandate had been taken as equality's root rather than a prohibition against irrational legislation).

66. 5 U.S. (1 Cranch) 137, 163 (1803).

morality of conforming one's conduct to rules, and limiting the sovereign's hand by the constitutional insistence that the sovereign conform as well.

Importantly, the terrain, or reach, of legalism so understood—what I will sometimes call pacific legalism—is contestable, and contested, as is the terrain, or reach, of legalism understood as an ethical attitude regarding the morality of conforming one's conduct to rules. It is not always clear when there has been a failure of pacific-legalist ideals and when there has not, any more than it is always clear when there has been a failure of legalist ideals that pertain to rule conformity and when there has not. Nevertheless, as with rule conformity, we can identify a core set of cases in which the ideal is met, and a core of cases in which it is not. From that core, it is not hard to describe the area of agreement. It might be possible to at least describe, if not settle, the contested terrain, or periphery. Let me take up these projects in that order.

CORE AND PENUMBRA OF LEGAL PACIFISM

I start with the core. The conventional wisdom that there has never been, here or elsewhere, anything resembling Hobbes's metaphorical state of nature is demonstrably false. Let me suggest the following examples. First, there are all too many locales around the globe where, precisely because of the absence of an organized state that monopolizes force, lives are nasty, brutish, barren, and short in precisely the fashion described by Hobbes.⁶⁷ Those societies surely suffer from a lack of law, and from a lack of "legalism," but not, or not only, in the sense identified by Shklar. True, it may be that no one with power in those societies is particularly committed to the morality of rule governance. Force is unpredictable. What is feared, however, is not the unpredictability of state force; what is feared is violence. Note the title of the now-famous memoir from Rwanda: *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*.⁶⁸ It was surely not the uncertainty or unpredictability of the violence that was dreaded. Lawyers (as well as most others) recognize these tragedies as a failure of the Rule of Law, and more spe-

67. See, e.g., DENIS JOHNSON, *SEEK: REPORTS FROM THE EDGES OF AMERICA AND BEYOND* (2001) (reporting on pockets of lawlessness, anarchy, and violence in the U.S. as well as in countries such as Somalia and Liberia).

68. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1999).

cifically, a failure of the Rule of Law in the pacific-legalist sense, not the rule-conformity sense. The Rule of Law is precisely what societies with terrorizing gangs of gun-toting men and children lack. Surely it is a part of "legalism," ideologically and attitudinally, to find such arrangements morally objectionable.

A second example of Hobbes's metaphorical state of nature can be found in a society with an established legal system, when the state withdraws or never extends the protection of law to a subgroup. That unprotected subgroup then lives in a state of nature, or a state of *warre*, with respect to each other, even though others enjoy the protection of the Hobbesian state, and even though the state itself is not endangered by civil war. Think of the traditional, patriarchal, privatized family, when the violence within it is unregulated by law.⁶⁹ Family members, when unprotected by the state against the violence of others within the family, live in a Hobbesian state of nature, with all the attendant fears, liabilities, vulnerabilities, and indignities that Hobbes so aptly described, no matter how thoroughly regulated or overregulated life might be outside the family. As anyone who has been victimized by this totalizing violence can tell you, the harm of such a world is not limited to the violence and the fear of it.⁷⁰ Life becomes nasty and brutish as well as short: devoid of industry, culture, letters, art, and society, no less so, than is life in Hobbes's not so mythical state of nature.

There is, furthermore, a consequence of the absence of state regulation in such subgroups, such as patriarchal families, that Hobbes did not dwell on, perhaps because he did not notice it, perhaps because he did not view the patriarchal family or the violence within it as particularly problematic. Hobbes famously hypothesized a rough physical and mental equality among inhabitants in the state of nature: Natural men, he observed, are roughly equal in strength and cunning.⁷¹ Because of their rough equality, all are, roughly, equally vulnerable; anyone can be toppled. For Hobbes, there were two consequences of

69. See, e.g., *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824) (upholding the lower court's refusal to instruct the jury that a husband can commit an assault and battery on a wife even though a husband ought to restrain from chastisement, except in cases of emergency, because it would be unseemly to try husbands for violence against wives due to undesirable publicity).

70. The best treatment of this phenomenon is still ERIN PRIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1977). See also DEL MARTIN, *BATTERED WIVES* (1976).

71. HOBBS, *supra* note 42, at 86-87.

this rough natural equality. The first is that no natural hierarchies persist for long. Even the weakest can and will conspire with others to kill the strongest.⁷² And second, precisely because of the rough natural equality, *all*, including the momentarily empowered, have a natural rational motive to disarm and enter civil society.⁷³ Even the strongest is vulnerable, so even the strongest has something to gain by submitting to the sovereign.

But Hobbes's premise of natural equality, to modern eyes, looks transparently—and significantly—wrong. Clearly, within some of the subgroups, insulated against state regulation—and certainly within families—there is not the natural physical or mental rough equality Hobbes thought existed with respect to men in nature, which kept all perpetually at risk from the aggression of all, rather than some perpetually subordinate to others. Just think of poor four-year-old Joshua DeShaney, beaten into a state of permanent mental retardation by his stepfather.⁷⁴ Joshua presumably did not enjoy the sort of approximate physical equality or mental cunning with his stepfather that Hobbes thought obtained in the state of nature, although Joshua surely suffered the consequences of living in a pocket of lawlessness outside the Leviathan's reach. If we can generalize from Joshua's tragedy, we might say this: Where the law's protection does not reach, the result is not that all men within that unregulated pocket live in a state of nature of the sort described by Hobbes—equally nasty, equally brutish, and equally short. Rather, because of whatever natural and systemic inequalities of strength and cunning might exist in those pockets of life untouched by the Leviathan, life is somewhat, as described by Hobbes, in the state of nature, but it is something else as well: It is also *hierarchical*, and in a way he did not see, or if he did, he did not worry over it. The withdrawal of the Leviathan, or the refusal to extend it in the first instance, exacerbates, by not addressing, not only the natural brutalities, but also the natural inequalities that flow in the unregulated private realm. Some, but not all, are not only at risk of living short lives, bereft of culture, education, art, and society, overridden by fear, but also, as a result, at risk as well of living out their

72. *Id.*

73. *Id.* at 90.

74. *DeShaney v. Winnebago County Soc. Serv. Dep't*, 489 U.S. 189, 195–96 (1989) (holding that there is no constitutional right to police protection against violence).

lives under the thumb and according to the will of the stronger and feared other.

Third, a Hobbesian state of nature might persist within societies that nevertheless enjoy a limited Leviathan, if citizens are protected unequally, meaning *nonreciprocally*, such that the violence of one group against another is prohibited and deterred, but not the other way around. The consequence of non-reciprocal protection is that the privileged group enjoys freedom from fear, and from domination by others, but the subordinate group does not. If protection is withdrawn from one group against the violence of another group, while the second group continues to enjoy the protection of law against the violence of the first, then the unprotected group lives in a state of perpetual subordination to the protected group, not because of natural inequality, but because of the unequal protection of law. The result of this uneven protection is not the insulated pockets of savagery Hobbes thought he saw among Native Indians on the American continent,⁷⁵ nor is it the violence and natural hierarchies of power and violence that we can see, in retrospect, in family violence. Rather, the result is institutionalized, state-sanctioned slavery.⁷⁶ If I can maim you, beat you, assault you, with no fear of state sanction, but you cannot do likewise, then it is no hyperbole to suggest that I am your master. More generally, the consequence of unchecked violence perpetrated by *one* group, systematically, against another, even within a society with an established Leviathan, is the subordination of the unprotected group to the domination of the privileged. That refusal to extend equal protection of the law, in its most extreme manifestation, just is the institution of slavery, and wherever the institution exists, it is evidence of the simultaneous coexistence, in a Hobbesian framework, of the Leviathan state, and the unequal state of nature to which it delegates some but not all of those whose legal relations are defined within it.

These three examples of lawlessness—the society with no law; the society with law but with pockets of life in which vio-

75. HOBBS, *supra* note 42, at 89.

76. This was clearly recognized, in southern pre-bellum cases dealing with violence perpetrated by masters on slaves, in the American south. *See State v. Mann*, 13 N.C. (1 Dev.) 263, 1829 WL 252, *3 (1829) (“The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.”). *See generally* MARK TUSHNET, *AMERICAN SLAVE LAW AND MANN V. STATE* (2003).

lence is unregulated; and the uneven, or unequal, or nonreciprocal protection of law, which defines slavery—are failures of ideological legalism, by which I mean that they are failures of the moral commitments that define a legalistic worldview. They are not *only* moral failures, offensive to any decent moral or political sensibility. They are specifically legal tragedies, offensive to specifically legalist sensibilities at the core of legal identity—offensive, that is, to the ideal of civic peace achieved through law. And, they are not *only* legal failures, in a positivist sense: They are therefore moral and political tragedies as well. The failure of law is at their heart, not margin; the failure is moral as well as legal; and the failure accounts for their tragic dimension. Law exists so as to counter the force that leads to just these miserable social configurations. That is not only law's political point. That is law's moral point as well, or at least a goodly part of it.

Now let me turn to the contested periphery of legalist pacifism: What is the evil of unregulated life, over which the Leviathan is such an improvement? As even Hobbes himself made clear, the evils attendant to undeterred violence in the state of nature, as well as in established legal societies, are not limited to loss of life or even the fear of loss of life.⁷⁷ As noted above, Hobbes includes as well the low quality of life that results from the primacy of fear for one's physical survival, and the exhausting effort required to hold the fear at bay. That low quality of life is a harm that is itself caused not only by the threatened violence but also by insufficient legalism: the failure to assure the safety that follows from establishment of the Leviathan. There are other such harms, however, at least arguably, both of the body and mind, that Hobbes did not note, also caused by the failure of law to protect against violence. Domination of and dispossession of one's own body, where the threat of violence suffices to secure the domination, are obviously such harms.⁷⁸ Likewise, as critical theorists of the past century have consistently argued, the systemic, rather than sporadic, patterns of domination where power is not equally bestowed, and protec-

77. HOBBS, *supra* note 42, at 86–90.

78. This dispossession of the body has been an organizing insight of both critical race theory and at least radical feminist legal theory. See, e.g., Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); CATARINE A. MACKINNON, *ONLY WORDS* (1993); CATARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

tion not equally granted, has a distorting effect on culture and on thought—on “consciousness.”⁷⁹ That false consciousness, as well as all the inequalities at the heart of it, is another such harm.⁸⁰

There are, also though, arguably more sorts of “violence,” just as there are likely more harms than catalogued in the *Leviathan*, and it is these acts and the harms they cause that constitute the contested periphery of pacific legalism. The domination and dispossession of one’s sexual body can be brought on by forceful means different from either physical violence, conventionally understood, or its threat—or at least this has been the central claim of radical feminists, most strikingly Catharine MacKinnon, for going on thirty years now.⁸¹ Economic force exerted against individuals made vulnerable by their lack of resources engenders fears and occasions harms also comparable in magnitude to those brought on by violence and the fear of it, as claimed by critics of market capitalism, including prominent legal progressives, realists, and pragmatists from the first part of the twentieth century and critical scholars from the second. Sexual, economic, and physical force against individuals, overwhelmingly women, who are made vulnerable by virtue of their time- and energy-zapping role—whether or not voluntarily assumed—as caregivers to the newborn and the aged, and the state of dependency that role brings in its wake,⁸²

79. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith trans., 1971) (arguing, contrary to traditional Marxism, that even heavily authoritarian regimes cannot rely solely on force to maintain their power, but always require some measure of perceived “legitimacy” as well in popular consciousness). For a general discussion of the impact that Gramsci’s claim (that “legitimation” and “hegemony,” rather than force, are the means by which both authoritarian and nonauthoritarian political systems maintain control) has on classical Marxism, see CARL BOGGS, GRAMSCI’S MARXISM (1976). For a discussion of the outsized role of legitimation theory in critical legal studies, see authorities cited in note 80 *infra*.

80. The critical legal studies movement has largely (albeit not entirely) organized itself around this central insight, in turn taken from mid-century critical theorists and neo-Marxists. For discussions of the impact of legitimation and false consciousness in law, see Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977); Morton J. Horwitz, *Rights*, 23 HARV. C.R.—C.L. L. REV. 393 (1988); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304 (David Kairys ed., 1982).

81. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

82. This is the thesis of Eva Kittay’s important critique of liberalism: By

also carry with it harms of a Hobbesian nature. Caregivers the world over suffer from too much fear, and not enough of the arts, letters, society, history, and so forth that Hobbes rightly argued give adult life so many of its pleasures.⁸³ Lastly, harms within hierarchies of otherwise justifiable power are brought on through abuses that are short of conventionally understood violence, when unregulated by the state. The spiritual and psychological and psychic force exerted by a priest upon a church member or an altar boy,⁸⁴ or a teacher upon a student,⁸⁵ or a captain upon a private,⁸⁶ or an employer upon an employee,⁸⁷

virtue of its failure to take the basic biological and moral facts of infancy and age into account, it cannot possibly deal with the phenomenon of dependency, and the species-wide need to protect caregivers against harm and want, without sacrificing its basic tenets. See generally EVA KITTA, LOVE'S LABOR (2000). She does not, however, as I have in the text, characterize this neglect as something akin to violence.

83. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

84. There is to date little scholarship on the nature of the actual harms endured in these assaultive and largely unregulated relationships, a lack indicative of the silencing of victims, although the "scandal" facing the Church has of course been widely trumpeted, with well-known and serious consequences for the church's coffers. For some indication of the continuing complicity of the law in the silencing of these harms, see, for example, *Richelle v. Roman Catholic Archbishop of San Francisco*, 130 Cal. Rptr. 2d 601, 617-18 (Cal. Ct. App. 2003) (affirming dismissal of emotional distress claim against defendant priest and diocese, arising out of the priest's alleged exploitation of plaintiff's piety and trust in the church to pursue sexual contact, on the grounds that adjudication of the extent of plaintiff's vulnerability to sexual manipulation by priests would be an unconstitutional inquiry into "profoundly religious questions"); *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 734 (Ky. 2002) (per curiam) (reversing a trial court's refusal to seal records in a priest abuse case, in part "to keep the parties from using the court as a megaphone to amplify and give credence to scandalous and salacious allegations"); *Napierski v. Unity Church of Greater Portland*, 802 A.2d 391, 393 (Me. 2002) (refusing to recognize the tort of negligent supervision as applied to a parish).

85. For a good discussion of sexual harassment of girls in middle school and the various forces, both legal and cultural, that tend to silence discussion of those harms, see PEGGY ORENSTEIN, SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP 111-35 (1994). I discuss the harms recognized in the sexual encounters and relationships between teachers or professors and their students that constitute sexual harassment, and contrast them with the harms in these relationships where there is no actionable sexual harassment, in Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique*, 3 WIS. WOMEN'S L.J. 81, 108-11 (1987), and more generally, in Robin West, *Sex, Harm and Impeachment*, in AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE (Leonard V. Kaplan & Beverly I. Moran eds., 2001).

86. The silencing of discussion regarding sexual harassment and sexual

toward the end of appropriating the body of the latter for the former's sexual satisfaction, although not recognizably violent, carries Hobbesian harms, and is affected by Hobbesian weapons: superior power, exercised in an insulated state of nature, untouched by the Leviathan's supposed monopoly on legitimate force.⁸⁸

Sexual violation and harassment so as to secure sexual satisfaction, the exploitation of physical needs such as food and shelter so as to secure profit, and the domination of one sex by the other so as to secure the reproduction and nurturance of the species, all, I think, are abuses of private power that give rise to Hobbesian harms. All persist because of the problem artfully identified by Hobbes: the lack of organized civic authority with the legitimate, delegated power to deter them through its exercise of delegated force. All of these harms are found in organized as well as disorganized societies, and all are within the power of the state, through law, to control. For purely Hobbesian reasons, the state's duty to prohibit or minimize these harms, through law, should be as much a part of the ethos of legalism, as the duty to prohibit homicide, and for much the same reasons. Unregulated, the private power that exploits natural need, that seeks to colonize and possess the body of the weak for the sexual satisfaction of the strong, or that enlists, through force and threats of force, one sex to the uncompensated labors of child raising, delegates some, but not all, to the conditions so aptly described in Hobbes's *Leviathan*.⁸⁹ They result in a life lived in fear, without culture, education, navigation, or pleasure, a life which, around the globe, is nastier,

assault in the military is a function of the continuing vitality of intramilitary immunity, a reluctance of civil courts to second-guess or micromanage military decisions that seem to impinge upon military authority and various cultural codes of honor. For an excellent discussion and critique of military immunity doctrines in this context, see Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 77–81 (2003). See also ABCNEWS.com, *Rape Without Repercussion? Women Say Assaults Are Not Prosecuted at Air Force Academy* (Feb. 28, 2003), at http://abcnews.go.com/sections/2020/US/2020_airforce_allegations030228.html (discussing assault charges and attempts by command to silence complainants and victims).

87. Although there are now many cases on this topic, the best discussion of the harms of employment-based sexual harassment, the silencing of victims of those harms, and the legal system's complicity in that silencing is still CATHERINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

88. HOBBS, *supra* note 42, at 88–90.

89. *Id.* at 89.

more brutish, more fearful, and more threatened than the lives of others not so willfully and blithely abandoned by the state.

To sum up, my basic claim is that a commitment to the value of state sovereignty, as compared with private abusive power, and for basically the reasons articulated by Hobbes, is a core commitment of legalism, not reducible to a belief in the desirability of following rules. However, if there is such a commitment at legalism's core, it is one that has unquestionably been slighted by contemporary jurisprudential treatments, and likewise, by contemporary constitutional argument. One sees, for example, in "Rule of Law" scholarship, extensive writings expanding upon, and extolling, the Rule of Law understood either in the Shklarian sense of a commitment to rule abidance, or in the Hayekian sense as a commitment to a minimal state,⁹⁰ but little on the value of the Hobbesian Rule of Law as an improvement over chaos, deregulation, or civil war. More clearly still, our constitutional doctrine, and increasingly constitutional consensus, coalesces around an understanding of law itself as that which limits the power of the state through rules, rather than that which emanates from states so as to limit the power of private parties. If we take the long view, it may be that legalism consists of a commitment to pacific legalism, no less than a commitment to the morality of rules. If we take the short view, however, or a snapshot view, it is easy to conclude that pacific legalism is fast disappearing from view, or is no longer a central, whether or not peripheral, part of legalism.

Why is that? One reason, maybe the main reason, for the low profile is political through and through: Despite the strength over the last half century of liberal legalist traditions, a conservative and libertarian strand of legalism is on the ascendance in American law schools, and that strand of legalism—call it conservative legalism—is overtly hostile toward a Hobbesian understanding of the state. "Conservative legalism" values traditions and negative rights against the state, while the Hobbesian contract represents a break from tradition and spotlights the Leviathan's right and obligation to monopolize force so as to protect the commonwealth.⁹¹ Thus, pacific legalism, even its Hobbesian core, introduces a politics into the ideology of legalism that is deeply at odds with the conservative

90. FRIEDRICH A. VON HAYEK, *The Safeguards of Individual Liberty*, in *THE POLITICAL IDEAL OF THE RULE OF LAW* 29, 29–45 (1955) (arguing that the Rule of Law requires a minimal state).

91. HOBBS, *supra* note 42, at 124–25, 144–45, 153.

and libertarian interpretation of legalism now on the rise in American law schools as well as on the Bench. A second reason, however, for the relative lack of an explicit recognition of the centrality of "Hobbes's thesis" to ideological legalism is simply the insularity of jurisprudence, and the resulting barriers dividing legal and political theory. Hobbes is typically read as arguing the preferability of a state—even an absolute, totalitarian state—to the chaos and terror of total war, civil or otherwise—the preferability, in other words, of the security of a strong state over the nightmarish freedom of its total absence in a metaphoric state of war.⁹² Thus read, Hobbes has little to say, at least jurisprudentially, about the conduct of state affairs, or the content of laws, in established societies with operating state Leviathans.

This is, however, far too limited a reading of Hobbes, too limited an understanding of the domain of jurisprudence, and too limited an understanding of the ideology of law. The state of nature is not simply a mirage or metaphoric device; there are contemporary societies better described by Hobbes's early chapters in *Leviathan*, than by any positive, anthropological account of law and legalism.⁹³ More to the point here, there are pockets of life in societies, including our own, that clearly have an organized Rule of Law, in which the protection of that Rule of Law is absent: most strikingly the state of slavery and the wave of lynchings that came in its wake, but also the violent domestic home, protected against the Leviathan's reach by concerns for privacy in the twentieth century, and by an overt embrace of patriarchy in the nineteenth. And there are still pockets of immunity from regulation, protecting particular relationships that carry Hobbesian harms: not only the priest's, captain's, teacher's, or employer's sexual aggressions upon hierarchic inferiors, but also the still largely unregulated exploitative labor contract, or the underpoliced minority and poor communities, unprotected against civil violence by underfunded, understaffed, or undermotivated police forces. In these pockets of lawlessness, victims suffer at the hands of exploitative stronger individuals. And in those pockets of immunity, the suffering is caused not only by the stronger's stronghold, but by the lack of legalism that facilitates it: the failure of the law to assert or to claim a monopoly on the use of legitimate force. In

92. *Id.* at 128–29.

93. See JOHNSON, *supra* note 67.

none of these cases—these failures of legalism—can the harms experienced by the weaker members be fairly described as the failure of the strong to “play by the rules.” These failures of legalism are, rather, failures of pacific legalism. They are the harms caused by our collective failure to assure for all the degrees of security and freedom from fear that law’s protection, and only law’s protection, against the violence of others, can bequeath.

A HOBBSIAN AMENDMENT TO SHKLAR’S LEGALISM

Let me return to Shklar’s critique of legalism. Again, Shklar reaches two, largely critical, conclusions. The first regards the political stance implied by legal ideology. Legalism, Shklar argues, implies a broadly monolithic conservatism—a respect for rules for the sake of rules quickly becomes a respect for the past, just for its own sake. As a result, the professional, ideological worldview that legalism constitutes is anthropologically conservative.⁹⁴ It is easy enough to see how Shklar is led to the conclusion that legalism is “by definition” a conservative ideology: Rules bind us to the past. When we follow rules, we perpetuate, or maintain, the ordering those rules embrace, constitute, or reflect. If we believe that following rules is not just prudent but moral, then that belief defines a way of life, or an ethic, that stands in clear opposition to a way of life that tolerates or advocates bucking the rules, or overthrowing the order from which they were promulgated, or ignoring them altogether, or even, for that matter, reforming them or criticizing them. As Professor Paul Kahn has recently argued, echoing Shklar, our conception of the Rule of Law commits the lawyer to a conservative understanding of her task that stands her in opposition not only to the revolutionary and the anarchist, but even to *the legislator*, who sees the law he creates as a means to change the status quo, rather than as a means of conserving it.⁹⁵ A commitment to an ethic of rule abidance puts one at odds with, not in service to, a skeptical, reasoned, and critical stance toward the value of the rules themselves, and a willingness to incur personal and social risk to see them tested.

Now, the question is whether a neo-Hobbesian amendment

94. SHKLAR, *supra* note 2, at 10–17.

95. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 68–73 (1999) (contrasting “political” with “legal” understandings of events).

changes this picture of ideological legalism's politics. On first blush, the answer seems to be no, or that if it effects a change, it is for the worse. Hobbes, after all, eschewed both political democracy and the natural rights tradition—seemingly opening the door to unrestrained state power, limited only by sovereign whimsy.⁹⁶ The unlimited Leviathan, restrained neither by the popular will nor by the rights of individuals, appears to modern legalists, as often as not, as either the blueprint for dictators and fascists—best exemplified by Saddam Hussein or the Taliban—who can maintain power so long as their regimes are marginally better than the chaos of war that might replace them, or alternatively, the blueprint for a regime, whether or not elected, that wishes to govern without respect for the rules that stay the hand of the sovereign: the regime, perhaps, of a John Ashcroft. This reading of Hobbes, however, is false, and even cartoonish. Hussein lost any legitimacy long ago, if Hobbes's *Leviathan* is the judge, when he became a threat to the survival of his own people,⁹⁷ and there is likewise enough of the civil libertarian in Hobbes's description of the judiciary, of the judicial function, and of the nature of judging to give pause to any devotee of Ashcroftian justice.⁹⁸

More important, it is surely possible, as political theorist Jean Hampton has recently made clear,⁹⁹ to read Hobbes's *Leviathan* as implying not an apologia for totalitarianism, but rather, a forceful and subtle case for democracy: If we take seriously the notion that a compact underlies the Leviathan's claim to legitimacy, then the Leviathan must legislate in the interest of the commonwealth, and the only route to making sure that it does so is through the mechanisms of democracy. Further, and of greater relevance here, Hobbes's account of the positivist origins of property, and entitlement, make the way for a robust and redistributive state role in the securing of economic justice. Hobbes's account of property, its origins in state action, and the incoherence of natural views of rights to prop-

96. HOBBS, *supra* note 42, at 131–33 (on democracy); *id.* at 186–87 (on natural reason); *id.* at 200 (on rights).

97. *Id.* at 153.

98. *Id.* at 188–96 (stating that for commands to be law, they must be known and published, and interpreted in accordance with principles of equity, and that unreasonable sentences do not constitute binding precedent on future judges); *id.* at 203–05 (stating that ex post facto laws are invalid, as are sentences increased after the crime has been committed over the published sentence prior to the crime).

99. Hampton, *supra* note 51, at 13–19.

erty,¹⁰⁰ are indistinguishable from those of Cass Sunstein,¹⁰¹ as well as any number of critical and liberal scholars: Property is socially constructed through and through, the state is present in the demarcation, and the state retains the power, accordingly, to regulate its use, so long as it does so in the public interest.¹⁰² This is not only Sunsteinian administrative and constitutional theory; it is Hobbesian jurisprudence as well.

There is, however, a deeper connection between Hobbesian jurisprudence and contemporary, nonconservative understandings of law's promise. Hobbes saw, and expressed better than anyone before or since, the harm done to individual lives through the exploitative abuse of private power. If unchecked, the lives in the state of nature constructed by private power are brutish, nasty, short, and barren—devoid of pleasure. The state, representing the commonwealth, and resulting from social agreement, and in the interest of all, exists to stave off that harm, and it does so by requiring mutual disarmament. This is a point of departure regarding law's meaning, essence, and purpose that is, I believe, widely accepted by legal professionals, but that is also utterly different from the point of departure criticized by Shklar.¹⁰³ Further, it implies a political perspective that is decidedly not conservative, when transposed to modern parlance and controversy. For Hobbes, the target of law—its *raison d'être*—is the abuse of private power, and the goal of law is a social life free of fear of that abuse. The goal of law is not only to encourage or force rule-compliant behavior. The goal of law is to create the conditions for a higher quality of life than could be had in the absence of law, and the reason for its neces-

100. HOBBS, *supra* note 42, at 170–76.

101. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (arguing that the Constitution requires a questioning, skeptical, rational, and continual reassessment of claims to all entitlements).

102. Prominent legal realists and critical legal scholars have argued this basic claim in the context of various areas of law. See generally Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 479 (1923) (discussing coercion within supposedly free contracts and arguing against distinguishing between a private realm of freedom and a public realm of coercion); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (arguing that property rights are a product of state power and become an exercise of power indistinguishable from concepts of sovereignty); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (discussing the legal construction of family); Morton Horwitz, *The History of the Public/Private Distinction*, 130 PA. L. REV. 1423 (1982) (attacking the distinction between public and private).

103. SHKLAR, *supra* note 2, at 1–2, 8–12.

sity is the psychology and effects of unregulated private power. These are political values central to law's point and hence central to legalism.

These political values are also, however, closer to progressive than libertarian interpretations of the liberal tradition that, like Hobbes, see the exploitation of vulnerability and the abuse of private power as an impediment to the enjoyment of social and civilized life. As such, they are the political values at the heart of the most successful progressive political movements of this country's past. The abolitionist movement aimed at securing the protection of the Leviathan for all, and not just for some, against the violence of others.¹⁰⁴ Feminist movements of the last two centuries have aimed to secure state protection against domestic violence, reform rape law, and secure reproductive freedoms, and all three goals can best be seen as a movement aimed at securing the protection of the Leviathan against the violence of patriarchy. Progressives over the last century and a half have sought to secure positive welfare rights, labor rights, and even environmental rights, against the exploitative and abusive use of private power—to secure the “four freedoms,” including the freedom from fear,¹⁰⁵ that Roosevelt identified. The welfare movement, broadly defined, has likewise been grounded in a Hobbesian political impulse that sees the need for those rights as a function of the vulnerability of some to the economic and exploitative power of others, and as a harm, accordingly, from which the state is obligated to protect us.¹⁰⁶ More locally and recently, the movement for gun con-

104. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 87–88 (photo. reprint. 1968) (1860) (arguing that the language of the Constitution imposes a duty on government to protect people from private violence); HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852).

105. FRANK FRIEDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 360–61 (1990) (quoting President Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941)).

106. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997) (discussing textual grounds for affirmative constitutional obligations to provide for basic welfare); Frank I. Michelman, *The Supreme Court 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, (1969) (same); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990) (same). Recently journalists have done more than lawyers to make vivid these harms and their connections to exploitation. See generally BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001) (describing a journalist's undercover observations of the plight of the minimum wage earner); DAVID SIMON & EDWARD BURNS, *THE CORNER: A YEAR IN THE LIFE OF AN INNER-CITY*

trol in this country can be seen in Hobbesian terms: To secure the law's protection against the other, we all, not just some, must forego lethal violence and its weaponry. One could readily conclude that we have a right to gun *control*, in fact, rather than a right to guns, if we were to take a little more seriously a Hobbesian interpretation of the Fourteenth Amendment.¹⁰⁷ The current legal movement to secure the protection of inferiors against the sexual and exploitative power of superiors—in the military, in religious institutions, in schools, and in workplaces—can likewise be understood as an attempt to end this exemption from the protection of the state against the harms of physical and invasive exploitation in these private spheres.

The admittedly counterintuitive connection between Hobbes and these progressive causes is that both see the problem of private power as the political problem for which *law* poses a solution. It is this point of commonality between political progressivism and legalism—the focus on private power as the *raison d'être* of law—that Shklar's understanding of legalism entirely overlooks. And, it is because she overlooks it that she sees, in legalism, nothing but an uncomplicated monolithic conservatism. Lawyers do see the need and the value in conforming conduct to rules. Sometimes, lawyers see the need, in social life, for law where there has been no law: in the domestic, patriarchal, violent home; in the deregulated gun industry and the violent culture that is in part its consequence; in the underregulated world of labor contracts and the sickness, fatigue, and dulling of life that is its result; in the Catholic confessional booth, the marine barracks, the production line, or the teacher's office, where unregulated sexual aggression can lead to the scarring of spirit, emotion, social engagement, and growth. What lawyers see, when they see the need for law in these protected, private spheres, is the same brutality, nastiness, and low quality of life that so frightened Hobbes. When lawyers urge a piercing of the various veils of privacy that insulate and naturalize those spheres, so that the social ills within them can be addressed, they are assuredly acting toward a political goal.

NEIGHBORHOOD (1997) (describing two journalists' observations of inner-city life on a street corner in Baltimore for one year); Jack Newfield, *How the Other Half Still Lives: In the Shadow of Wealth, New York's Poor Increase*, THE NATION, Mar. 17, 2003, at 11–17 (highlighting the obstacles and problems of the poor that go largely unseen and ignored by the rest of society).

107. The citizen gives over the perfection of his right to self-defense to the sovereign, who in turn has a duty to protect the citizen against violence. HOBBS, *supra* note 42, at 153.

But they are also acting on legalist impulses. We should not have these nasty, brutal, short lives in our midst, brought on by an irresponsible or neglectful state that refuses to extend the protection of its law to all. It is the place of law, and the place of the lawyer acting on legalist values, to see that we do not.

Not to overstate: The point is *not* that all lawyers support these political campaigns, or that by virtue of their profession, they should. Our professional values are multiple and conflicting, our "legalism" is complicated. Rather, my point is that a lawyer who does embrace these campaigns does not do so at the cost of some compromise of an essentially conservative professional ethic that values only conformity to the rules laid down, sees law as always there, and views as implicitly permitted all that is not forbidden. Legalism, as a professional ideology, is indeed a political ideology, as Shklar has argued. But it is complicated and conflicted politics, and we are all the better for it.

PACIFIC LEGALISM AND GLOBAL POLITICS

I will comment more briefly on Shklar's second and perhaps more consequential critique of legalism: Legalism, understood as an ethical attitude that finds compliance to rules a morally attractive way of being in the world, is, as an ideology, inappropriately injected in world and international geopolitics where it has little relevance. To first provide some context: Shklar originally put forward this argument in 1964, against the backdrop of the war crimes tribunals in Nuremburg and Tokyo following World War II, and the Stalinist political trials in Moscow during the thirties, and she then reaffirmed it with the second edition of her book in 1986. Little had happened in that twenty-year period between editions of the book, Shklar argued in the preface to the latter edition, to shake her conviction that the "war crimes tribunals," whatever good they do, do not evidence the endurance of legalism.¹⁰⁸ Rather, they evidence not just the futility but the bankruptcy of legalism's claim to respond to crimes against humanity, and illegal war, with nothing but the moral force of rules.¹⁰⁹ Even the most successful, and most clearly politically justifiable war crimes tribunals—the Nuremberg trials—she argued in the mid-eighties, had not in fact become a precedent for any emerging body of law.¹¹⁰

108. SHKLAR, *supra* note 2, at xiii.

109. *Id.* at 134–35.

110. *Id.* at xiii.

Now, another twenty years later, perhaps she would not be so confident of her mid-eighties conclusion. War crimes tribunals, truth commissions, the International Criminal Court, and a score of more particularized commissions and tribunals proliferate,¹¹¹ and seemingly evidence a trend different from the one Shklar saw unfolding in the mid-eighties. Nevertheless, these modern tribunals arguably underscore rather than undermine her critique. The imposition of criminal laws and norms, the establishment of legalist institutions, procedures, and punishments—in short, the spread of legalism, understood as an ideology and as a commitment to the morality of following rules—might still seem, to many, as no less out of place in these modern trials as in the Tokyo trials of which Shklar spoke, and for some of the same reasons. The criminal trial, Shklar argued, is the pinnacle achievement of legalism.¹¹² The failure of the international criminal trial to achieve anything other than occasional political ends is the sign of the limits of legalism. And as the criminal trial is emblematic of legalism, its failure represents the failure of the international legal project in toto.¹¹³ The modern international trial may be equally problematic, or at least so its modern critics currently argue.¹¹⁴

I do not, however, wish to enter that debate; rather, I want to urge that the conclusion regarding the inappropriateness of legalism drawn from the Shklarian critique of the international war crimes trial is too sweeping, even if the premise is correct. It rests on an unduly cramped account of the ideology of legalism. The criminal trial may not be the pinnacle of legalism, if legalism is understood broadly as encompassing not only the moral attitude that conforming to rules is a good way to live, but also the moral attitude that the rule of law is preferable to the state of nature. The role of law, given a more expansive un-

111. See, e.g., International Tribunal for the Prosecution of Persons Responsible for the Prosecution of Persons Responsible [sic] for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 33 I.L.M. 1590 (1994) (providing an example of a more particularized tribunal).

112. SHKLAR, *supra* note 2, at 143–51.

113. *Id.*

114. See, e.g., Paul W. Kahn, *On Pinochet*, BOSTON REV., Feb./Mar. 1999, at 19, 22 (claiming that crimes against humanity lack legalist status because there is no political community, and that humanity has not legislated against such actions); David Luban, *A Theory of Crimes Against Humanity* 76–88 (unpublished manuscript, on file with author) (reviewing and then answering various theoretical critiques of universal jurisdiction over crimes against humanity).

derstanding of legalism, is not to punish wrongful acts that occur in the midst of wartime—it is not simply to insist that even in the midst of war, actors must conform their conduct to rules. Rather, the role of law, on this view, is to actually *deter* the *warre*—keep it from happening—not simply regulate its aftermath. The point of law is to displace war, not to legitimate it by punishing the wrongful acts that occur within it. The pinnacle legal moment, if we envision a legalism that embraces the pacific as well as orderly end of law, is just not the criminal trial. Rather, the pinnacle moment is the political moment of law's creation. Thus, in the domestic context, the pinnacle moment of constitutional legalism is not *Marbury v. Madison*,¹¹⁵ but the Constitutional Convention, or the Reconstruction Congress, or the passage of the Nineteenth Amendment. The pinnacle moment of ordinary legalism is not the trial, contrary to Shklar's insistence;¹¹⁶ it is the legislative process. And, in the international context, the pinnacle moment is neither the occasional nor the regular criminal tribunal constituted after the fact to punish illegal acts of aggressive war, or crimes against humanity that may be committed within them. Rather, as in the domestic context, the pinnacle "legalist" moment is the institutional "legislative moment": the moment when, in a social compact, sovereign heads of nation states agree to give up their natural rights to use lethal power in exchange for rights of protection from the commonwealth of nations, and the moment when those rights of protection are made meaningful through the passage of positive international law, backed by the international sovereign's willingness to use force to employ them.

Needless to say, we have not had such a moment. But we at least know what to look for. Evidence that there has been such a moment will be when the internationalized sovereign uses its delegated force so as to actually hold at bay—not legitimize after the fact—acts of war by the individual members of the commonwealth. And, as in the domestic context, it is politics, passion, and rational self-interest, not trials or a commitment to rules for the sake of rules, that will bring such a moment to pass.

I would suggest the following paradoxical conclusion. The test of the value of ideological legalism in the international sphere, and in the context of the recently concluded war in

115. 5 U.S. (1 Cranch) 137 (1803).

116. SHKLAR, *supra* note 2, at 144.

Iraq, should not be the success or failure of the war crimes tribunals that the Bush administration has promised will follow the cessation of the hot war phase of this struggle. Those tribunals will almost certainly be vulnerable to Shklar's critique. They may well appear legalistic, but be anything but. There will likely not be even the slightest pretense that the victors intend to submit to the procedures and institutions they impose on the vanquished. The trials themselves will have all the earmarks of victor's justice. The trials will satisfy no one that legal justice has been meted out. There will likely be numerous trials of Iraqis and no trials of American or British commanders or forces. The thoughtful critic of international law, and international legalism, will declare these trials worse than just a failure of legalism. They will legitimate, in the name of law and peace, an aggressive war—while American patriots declare them a victory for justice and fairness—and further solidify the status quo between powerful and powerless nations—while coalition forces proclaim them emblematic of equality and liberty both. More broadly, as Shklar would have predicted, they will neither represent nor constitute progress for civilization, for peace, or for international justice. None of this is inevitable, of course, but at this point, it all looks depressingly more probable than not. Shklar, presumably, would side with the thoughtful critics.

If, however, we regard law's pacific ideal as also a part of a legalist ideology, then it is not the war crimes tribunals that follow this war that are the telling gauge of the successes or failures of legalism toward the end of constraining violence or aggression. Shklar's insistence that the criminal trial is emblematic of the success or failure of public international law, I believe, is a function of her undue insistence that legalism is an ideology solely tied to the morality of rule conformity. Rather, if we consider the pacific ends of law, then it is not the trial that follows war, but rather, the attempt by international bodies to prohibit elective, nondefensive, and unauthorized wars, including this one, that is emblematic of legalism's successes and failures. If we look at these Hobbesian, law-making moments that *preceded* the war, rather than the war crime trials that will follow it, as either the canaries in the mine or the harbingers of hope, a different picture emerges of the appropriateness of legalism in geopolitical affairs.

Law failed to disarm Hussein, and law failed to contain United States belligerence; those are the canaries in the mine.

But—and here is the harbinger of hope—neither failure was a foregone conclusion. Prime Minister Blair apparently truly believed that the force of law—United Nations resolutions, backed by a demonstrated willingness to enforce them, the old-fashioned command of the international sovereign—would force Hussein to comply, in a classic, Hobbesian manner and for classically Hobbesian reasons.¹¹⁷ Blair was undercut in his effort by both the United States and France: the United States because it had no intention of only threatening force, instead of using it, and France, because it had no intention of using force, instead of only threatening it.¹¹⁸ Both attitudes defeat deterrence. Similarly, it is also clear, or at least the *New York Times* so reported, that Kofi Annan truly believed that law would stay the hand of the United States.¹¹⁹ Although it is not clear why he thought that, one can easily construct a Hobbesian account of why he might have: The common vulnerabilities, shared by the United States with other countries, to terrorism give all a rough Hobbesian equality, and that fact alone might convince the United States, if acting rationally and prudently, to continue along a diplomatic route, even against its warlike instincts. This Hobbesian outcome proved illusory as well. The United States, it became clear as the debate progressed, felt or professed no such equal vulnerability, terrorism or no, and consequently had no professed, felt, or actual interest in submitting to an international Leviathan, with its dictates prohibiting elective, nondefensive, and unauthorized war. Thus, the failure of legalism to stave off war was perhaps the inevitable outcome.

117. See Prime Minister Tony Blair, *supra* note 28, available at <http://www.number-10.gov.uk/output/Page3294.asp>.

118. For a sympathetic general discussion of the dilemma Blair faced, see Jane Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 631 (2003). For a similar analysis, pointing out that the U.N. Charter's Hobbesian purpose ("a compact by which the member states accept constraints on their use of force in the context of a binding system of collective security") and effectiveness has been weakened not so much by America's disproportionate power, as by the members' refusal to maintain a strong sanctions and inspections regime in Iraq, thus undermining the basic compact of constraints in exchange for collective security, see Edward C. Luck, *Making the World Safe for Hypocrisy*, N.Y. TIMES, Mar. 22, 2003, at A11; see also Joseph R. Biden Jr., *Why We Need a Second U.N. Resolution*, WASH. POST, Mar. 10, 2003, at A21 (arguing that the French refusal to use force under any circumstances, and the U.S. refusal to consider not using force, effectively destroys the possibility for resolving the crisis peacefully and "threaten[s] to drive the interests of our countries over a cliff").

119. Felicity Barringer, *U.N. Secretary General Faces His Most Difficult Moment*, N.Y. TIMES, Mar. 30, 2003, at B1.

Beneath the surface, however, the very occurrence of this very public debate over the legality of both Iraq's weapons and America's war evidences an expansive moment, I believe, for the reach of pacific legalism. Although law did not deter this war, one can see a rudimentary outline of how it could have done so and even how it might do so in the future: Had the United States and France both acted in good faith, perhaps they could have jointly and peaceably disarmed Iraq. Had the United States either had or felt a greater Hobbesian natural equality with other states, it might have been deterred from taking an action that violated the will and desire of the whole. Had France accepted the need for force to enforce meaningful prohibitions of Iraq's weaponry, and telegraphed its willingness to use it, perhaps the U.N. Resolutions, with continuing monitoring, could have been enforced with the threat of force, rather than its use. Had any of this happened, then legalism might have prevailed in the sense meant by Hobbes: The American state, sovereign in nature, might have foresworn its right to the perfection of its own defense, in exchange for the protection of the international community. In exchange, America might have agreed to abide by international rules. This did not happen, and it seems we are a good distance from the day when it might.

But that we can envision the possibility that law *could* preclude war in this way speaks volumes. Sovereign states, through their representatives, as well as political theorists, academic analysts, television commentators, op-ed authors, and persons-on-the-street quite literally all over the world, *talked* for months, and with some seriousness, not only about the illegality of weapons of mass destruction, but also about whether this war in particular, and preemptive war in general, is "legal" or "illegal," about why war cannot be legitimate if it is neither "defensive" nor "authorized," as required by a legal document, and why it cannot be waged if it is not legitimate. These discussions proceeded as though they mattered; as though the answers to these questions had consequences; as though law could deter as well as rhetorically forbid unauthorized war; as though we all naturally and rationally agreed that the world socially constructed by law is preferable to the social, cultural, biological, and ecological destruction and mayhem brought on by war's machinery; as though law's sanctions, orders, resolutions, and preambles would all constitute an alternative to war; as though we believed that we all naturally prefer a life in which we

forego self-defense so that all of us, certainly including Americans, might live less brutal, less nasty, and longer lives. And, these discussions proceeded as though we all agreed that the Leviathan therefore operates as an alternative to the natural *warre* of all against all; as though we all agreed that law has displaced nondefensive *warre* internationally as well as domestically; as though we all agreed that such wars are as foreign to our current way of thinking—as far in the past, as mythical, as distant—as the Hobbesian state of nature itself.

After that failed moment of lawmaking, and after the war that followed its failure, that impassioned, idealistic, hypothetical debate itself seems a part of a distant, mythic, even surreal, past. What might last, though, is some clarity of vision. At least we can now see internationally what Hobbes saw long ago, and that is the political precondition of such a momentous sea change in world politics. Occupants of the natural state, whether sovereign states or sovereign individuals, must be, and must feel themselves to be, vulnerable if they are to be committed to mutual disarmament. And the emergent sovereign, whether it be a league, a council, or a coalition, must then be willing, and feel itself to be willing, to use force, so as to effectively threaten force, to deter aggression. Only then does law emerge, and with all its promise.

That shared understanding is itself some evidence that legalism has in fact increased its domain. And, whatever Shklarian skepticism might be in order regarding the proliferation of war crimes tribunals, that our consciousness of pacific legalism as a serious alternative to war has expanded its domain this way is surely a positive thing. Legalism, as understood by Hobbes and the United Nations Charter¹²⁰ both, shows the contours of a world in which, through law's promise, life might be less nasty, brutal, and short for many millions of people. That promise, in the international context as well as in the domestic, is one in which the lawyers that constructed it should take considerable professional pride.

120. For a short but lucid discussion on the shared theoretical underpinnings of the U.N. Charter, see Luck, *supra* note 118. I am grateful to Jane Stromseth for her notice of this essay, and for her thoughtful comments throughout the formulation of this article.